

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' RESPONSE TO "DEFENDANTS' JOINT MOTION FOR
DISCOVERY OF DOCUMENTS RELATING TO CONVERSATIONS BETWEEN
THE GOVERNMENT AND FLINT'S ATTORNEY" (DOCKET # 173)**

On January 3, 2008, Gail Johnson, attorney for B&H Maintenance & Construction, Inc. ("B&H") sent counsel for the United States an email¹ wherein she requested "any documents or other materials related to any . . . conversations [with Ryan Stoll, attorney for Flint Energy Services, Inc. ("Flint") regarding the results of **his** internal investigation], including without limitation any handwritten notes that may exist." [emphasis added] Defendants cited no theory under which they would be entitled to "any documents" related to conversations between government attorneys and the attorney for a subject of a criminal investigation during the course

¹ A copy of the email exchange between counsel is attached hereto as Exhibit A.

of the investigation and in connection with plea negotiations.

The United States declined to produce any documents, stating:

The United States has already more than fully complied with its discovery obligations under Federal Rule of Criminal Procedure 16, its obligations to disclose evidence to Defendants as required by *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Bagley*, 473 U.S. 667 (1985), the Discovery Conference Orders, and the other Court orders relating to discovery that have been entered in this case.

Thereafter, the Defendants filed “Defendants’ Joint Motion for Discovery of Documents Relating to Conversations Between the Government and Flint’s Attorney” [Docket # 173]

(“Defs’ Joint Mot., Dkt # 173) requesting the Court to order the United States to produce:

any documents or other materials related to any conversations between the government and Ryan Stoll or any other Flint attorney in connection with the government’s investigation of this case (and the case against Flint and Rains), including without limitation any handwritten notes that may exist.

Id. at 3. In this Motion, Defendants analogize the character of the documents they have requested to the notes of one conversation with attorney Eugene Gozdecki that the Court previously ordered the United States to produce. *See* Order of December 10, 2007, Docket # 145 (Court ordered production of handwritten attorney notes of conversations with Eugene Gozdecki, attorney to Kenneth Rains, which took place on February 12, 2007, during which Gozdecki related Rains’ responses to specific questions asked by the United States). The United States complied with that Order as directed by the Court.

The notes requested in the present motion are different because they relate Flint’s attorney’s general understanding of what witnesses might say if interviewed. Furthermore, those witnesses were thereafter interviewed by the United States and the notes of the witness

interviews have been produced to Defendants. The notes at issue in the present motion were not the subject of the Court's order of December 10, 2007, Docket # 145.

Defendants cite no rationale under which notes of conversations among attorneys for the United States and the attorney for the subject of an investigation proffering that attorney's understanding of information his client might provide pursuant to a yet-to-be-negotiated agreement to cooperate and settlement of possible charges, would be discoverable. Defendants' request goes far beyond the requirements of Federal Rule of Criminal Procedure 16, The *Jencks* Act, 18 U.S.C. § 3500, the Discovery Conference Memorandum and Order entered in this case, the Court's Order of December 10, 2007, Docket # 145, and applicable case law. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Under this rationale, the Supreme Court has held that *Brady* does not authorize wholesale discovery. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Furthermore, the documents requested by Defendants are exempted from discovery pursuant to Rule 16(a)(2), Information Not Subject to Disclosure, which in pertinent part exempts: "internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." Therefore, the United States respectfully requests that the Court deny Defendants' Joint Motion Dkt. # 173.

Respectfully Submitted,

s/Diane C. Lotko-Baker

DIANE C. LOTKO-BAKER

s/Carla M. Stern

CARLA M. STERN

s/Andre M. Geverola

ANDRE M. GEVEROLA

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2008, I electronically filed the foregoing “United States’ Response to ‘Defendants’ Joint Motion for Discovery of Documents Relating to Conversations Between the Government and Flint’s Attorney’ (Docket # 173)” using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

gjohnson@hmflaw.com

hhaddon@hmflaw.com

pmackey@hmflaw.com

stiftickjian@hmflaw.com

patrick-j-burke@msn.com

markjohnson297@hotmail.com

rstoll@skadden.com

ggoldberg@hollandhard.com

mrmachphail@hollandhart.com

I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane C. Lotko-Baker

DIANE C. LOTKO-BAKER

s/Carla M. Stern

CARLA M. STERN

s/Andre M. Geverola

ANDRE M. GEVEROLA

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Lotko-Baker, Diane

From: Lotko-Baker, Diane
Sent: Tuesday, January 08, 2008 5:28 PM
To: 'Gail Johnson'; Stern, Carla; Geverola, Andre
Cc: Pamela Mackey; Mark Johnson; Patrick J. Burke
Subject: RE: B&H - additional specific discovery request re Stoll conversations

Gail-

It is the position of the United States that it is under no obligation to produce the information requested in your email of January 3, 2008.

The United States has already more than fully complied with its discovery obligations under Federal Rule of Criminal Procedure 16, its obligations to disclose evidence to Defendants as required by *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *United States v. Bagley*, 473 U.S. 667 (1985), the Discovery Conference Orders, and the other Court orders relating to discovery that have been entered in this case.

Diane C. Lotko-Baker
Midwest Field Office Antitrust Division
(312) 353-6857

-----Original Message-----

From: Gail Johnson [mailto:gjohnson@hmflaw.com]
Sent: Thursday, January 03, 2008 1:05 PM
To: Lotko-Baker, Diane; Stern, Carla; Geverola, Andre
Cc: Pamela Mackey; Mark Johnson; Patrick J. Burke
Subject: B&H - additional specific discovery request re Stoll conversations

Diane, Carla, and Andre,

Ryan Stoll called me a couple of weeks ago to discuss the subpoena duces tecum that we have served on Flint. In the course of our conversation, Mr. Stoll stated that he had engaged in one or more conversations with you or your investigative team regarding the results of the internal investigation conducted by him and at his direction. He further explained that he communicated to the government his perception of and acknowledgement of what he and Flint understood to be the wrongdoing at issue.

I am writing to make a discovery request on behalf of B&H for any documents or other materials related to any such conversations, including without limitation any handwritten notes that may exist.

Thanks and Happy New Year,

Gail Johnson
Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C.
150 East 10th Ave.
Denver, CO 80203

(Tel.) (303) 831-7364
(Fax) (303) 832-2628

EXHIBIT A

1/8/2008